Filed 4/25/19 Lyell v. Appellate Division of Superior Court CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

MIRIAM T. LYELL,

Petitioner,

v.

THE APPELLATE DIVISION OF THE SUPERIOR COURT OF SAN JOAQUIN COUNTY,

Respondent;

THE PEOPLE et al.,

Real Parties in Interest.

C087782

(Super. Ct. No. STK-CR-MDUI-2018-0009314)

This petition for mandatory or prohibitory relief involves a disagreement about how to handle the appointment of counsel for indigent defendants, here specifically misdemeanor drunk driving (DUI) defendants. Although the underlying DUI case has been resolved, the case is not moot as it presents issues of public interest that are likely to recur but that would otherwise evade review. (See *Simmons v. Superior Court* (1988) 203 Cal.App.3d 71, 74-75.)

The Attorney General concedes the facts properly alleged in the petition, which shows a practice by the San Joaquin County Superior Court misdemeanor DUI arraignment court of not appointing counsel at the initial arraignment hearing. Instead, the arraignment is continued for two weeks to require that the defendants contact an attorney to determine if they can afford to pay counsel. When the defendants return at the continued arraignment, they must present an attorney's business card and explain that they have inquired and are unable to afford counsel. At that point the court will ask the defendants to complete a financial declaration to determine whether to appoint the public defender.

In the specific underlying DUI case here, the defendant contacted the public defender after finding out through the local bar association that it would cost $30 for a consultation with an attorney, money defendant could not afford. The public defender appeared for defendant at the continued arraignment, but the trial court refused to recognize counsel's authority to appear absent a court appointment. The Attorney General concedes the court erred when it refused to recognize the public defender, but generally defends the court's practice of routinely continuing arraignments to require defendants to contact an attorney, citing the court's broad discretion to determine indigency.

We hold that the practices described by the petition depart from governing legal principles and thereby impose an unnecessary burden on indigent defendants. Because the underlying case has been resolved we grant prospective relief only.

BACKGROUND

Because the Attorney General has conceded the facts properly alleged in the petition, we take those facts as true and need not address a few minor quibbles.

The petition described the practice of the San Joaquin County Superior Court misdemeanor DUI arraignment court in part as follows: "When the misdemeanor out-of-custody DUI arraignments begin, Judge Vlavianos typically after informing defendants being arraigned [of] their procedural rights, informs each of them that if he or she wanted to be represented by counsel, he or she would need to go consult with a private attorney and figure out whether he or she had enough money to retain the private attorney. Judge Vlavianos would then inform him or her that if he or she could not afford to retain the private attorney, he or she should bring back the private attorney's business card and show it to Judge Vlavianos, before Judge Vlavianos would appoint the Public Defender. Judge Vlavianos would typically continue the matter for two weeks for that purpose, but he would not ask the defendant to enter a plea, or give the defendant an opportunity to withdraw time waiver under Penal Code section 1382. He also would not allow the defendant to fill out a financial declaration or determine based on the financial declaration whether the Public Defender should be appointed." When a defendant returns on the next court date and does not have retained counsel, "Judge Vlavianos would ask him or her whether he or she has consulted with a private attorney, figured out that he or she could not afford to retain the private attorney, and returned with the attorney's business card. Typically, only if the defendant did so, would Judge Vlavianos ask him or her to fill out a financial declaration to determine whether to appoint the Public Defender."[1]

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[1] The Attorney General suggests this language does not necessarily outline a settled practice of the arraignment court. We accept the Attorney General's point that the word "typically" does not mean without deviation. But "typically" does mean "normally,

In the underlying case, defendant L.Y. was charged with a misdemeanor DUI on July 27, 2018 (further dates are to 2018 unless otherwise specified). Supervising deputy public defender Denise Pereira was present in court during defendant's August 6 arraignment hearing. A friend had helped transport defendant to court. Defendant became upset and told the trial court defendant did not know what to do. The court replied by "continuing [the] case for two weeks and telling [defendant] to go to the San Joaquin County Bar Association *and pay to consult with a private attorney*." (Italics added.) The court did not ask if defendant wanted to enter a plea or to exercise defendant's right to a speedy trial. After court, defendant went to the bar association's referral service and learned that no lawyers were then available and that it would cost $30 for a consultation fee to consult with a lawyer, an amount that would place an "undue hardship" on defendant.[2]

Defendant filed a writ petition in the appellate division on August 15 seeking relief similar to that sought in the instant petition before this court, but the petition was summarily denied by order two days later.[3]

On August 17, defendant called Pereira, told her defendant could not arrange a ride to court, and asked Pereira to appear for her and ask for a continuance; Pereira agreed to appear for her on August 20, the continued arraignment date. On that date Pereira announced her appearance for defendant as requested, but the trial court "did not acknowledge Ms. Pereira as [L.Y.'s] counsel, refused to allow Ms. Pereira to appear for

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"usually," and "ordinarily." (Roget's Thesaurus (6th ed. 2001) p. 620.) Thus, the trial court judge *usually* runs the arraignment calendar as was done in L.Y.'s case.

[2] Defendant's declaration states the trial court told her to return to court with business cards from *two* attorneys. There are other minor differences between her declaration and the petition. We take the facts from the pleading admitted by the Attorney General, not from the declarations.

[3] The petition to the appellate division was also brought on behalf of two similarly situated DUI defendants who are not parties to the instant petition.

[L.Y.] pursuant to [Penal Code] section 977, and stated that the Public Defender has not been appointed on [L.Y.'s] case. He continued [L.Y.'s] case to August 27, 2018. He also issued a bench warrant against [L.Y.] in the amount of $20,000, but held the warrant until August 27."

The instant petition was filed on August 22, brought in the name of Miriam T. Lyell, as "Public Defender," technically seeking to overturn the appellate division's summary denial of relief. It alleged the practice described reflected an abuse of discretion, did not comport with relevant statutes, violated various constitutional rights, and would cause prejudice in various ways to indigent defendants.

On August 29, the public defender advised this court that counsel had been appointed for defendant, so the case was technically moot, but asked that we reach the merits to address the validity of the trial court's arraignment practices.

On September 28, we issued an order to show cause in part directing the parties to "address whether the policy and/or procedure described in the petition as being employed by San Joaquin Superior Court comports with Government Code sections 27706 and 27707, and whether it is consistent with *Joshua P. v. Superior Court* (2014) 226 Cal.App.4th 957, 963-965."

On October 19, we received a second status letter advising us that defendant had entered into a plea agreement resolving the case.

The Attorney General filed a return and "partial demurrer" to the petition, but admitted all facts properly alleged in the petition. Although the return questions the public defender's standing as a technical matter, it admits that "[t]he trial court's failure to recognize the Public Defender as counsel for [L.Y.] on August 20, 2018 constitutes a basis for mandamus relief." But the return contends the trial court's "practices do not violate any statutory or constitutional rights of defendants and falls [*sic*] within the discretion afforded trial courts to determine indigency and to manage the courtroom." The return argues the practice is "not outside the bounds of reason" and in part relies on

the rule that a judge cannot be forced to exercise discretion in any particular way. The return also contends the petition's various claims about how the described arraignment practices prejudice defendants are speculative.

DISCUSSION

Because the facts properly alleged in the petition have been admitted, we take it as true that (1) the trial court typically continues arraignments to require defendants to consult with a private attorney before making a determination of indigency and (2) when, as in the underlying case, a defendant contacts a public defender who tries to represent the defendant, the court typically refuses to recognize the existence of an attorney-client relationship. We address these two practices separately.

I

Not Recognizing the Public Defender

Government Code section 27706[4] provides in part: "The public defender shall perform the following duties: [¶] (a) Upon request of the defendant *or* upon order of the court, the public defender shall defend, without expense to the defendant, except as provided by Section 987.8 of the Penal Code, any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings . . . ." (Italics added.) Section 27707 provides in part: "The court in which the proceeding is pending may make the final determination in each case as to whether a defendant or person described in Section 27706 is financially able to employ counsel and qualifies for the services of the public defender. *The public defender shall, however, render legal services as provided in subdivisions (a), (b) and (c) of Section 27706 for any person the public defender determines is not financially able to employ counsel until such time as a*

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[4] Further undesignated statutory references are to the Government Code.

contrary determination is made by the court. If a contrary determination is made, the public defender thereafter may not render services for such person except in a proceeding to review the determination of that issue or in an unrelated proceeding."[5] (Italics added.)

Thus, a public defender must represent a defendant the public defender finds to be indigent "until such time as" the trial court finds otherwise, and until then the court *must* recognize the public defender as counsel for the defendant. (See *Joshua P. v. Superior Court* (2014) 226 Cal.App.4th 965, 963-965; *In re Brindle* (1979) 91 Cal.App.3d 660, 681 ["the public defender 'exercises an original power vested . . . by statute, not superior to but coequal with the power of the court' to determine whether a person is entitled to be

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[5] The remainder of section 27707 provides: "In order to assist the court or public defender in making the determination [of indigency], the court or the public defender may require a defendant or person requesting services of the public defender to file a financial statement under penalty of perjury. The financial statement shall be confidential and privileged and shall not be admissible as evidence in any criminal proceeding except the prosecution of an alleged offense of perjury based upon false material contained in the financial statement. The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the financial statement at the conclusion of the proceedings for which such financial statement was required to be submitted. The financial statement shall not be confidential and privileged in a proceeding under Section 987.8 of the Penal Code." The Judicial Council has promulgated a simple two-page form for defendants to claim indigency. (See Judicial Council forms, form CR-105.)

To allow recoupment of costs in appropriate cases, Penal Code section 987.8 provides that if a defendant is convicted (see *id*., subd. (i)), "the court may hold a hearing or, in its discretion, order the defendant to appear before a county officer designated by the court, to determine whether the defendant owns or has an interest in real property or other assets" (*id*., subd. (a)) for the purpose of imposing a lien on any such assets. Penal Code section 987.8, subdivision (b) provides for a noticed hearing on a person's ability to repay some or all of the costs of public representation. Before appointing counsel, the court must advise the defendant that the court might hold a hearing and find the defendant can pay all or some of the costs of counsel and order payment of same, an advisement given herein. (*Id*., subd. (f).)

represented by the public defender"].) As stated, the Attorney General concedes this point warrants relief, and in light of the statutes quoted we agree.[6]

II

Routinely Continuing Arraignments

The Attorney General defends the specified arraignment court's practice of requiring defendants to consult with an attorney to discuss whether the defendant can afford the expected legal fees, and then return with an attorney's business card.[7] We reject the Attorney General's view that because a public defender can always undertake (in the first instance) to represent someone, there is an adequate legal remedy barring writ relief. Under that view, only those indigent defendants knowledgeable enough to contact a public defender or lucky enough to be contacted by a public defender would obtain prompt counsel. We also reject the Attorney General's view that this practice comports with legal principles under the rubric of the trial court's discretion to determine indigency, or that granting relief would improperly compel the court to exercise its discretion in a certain way.

As we have emphasized before, discretion is delimited by the applicable legal standards, a departure from which constitutes an abuse thereof. (See *Estates of Collins & Flowers* (2012) 205 Cal.App.4th 1238, 1247; *City of Sacramento v. Drew* (1989) 207

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[6] The Attorney General properly points out that the authority to determine indigency is no longer coequal--the term used in some cases--as between the public defender and the trial court, because the latter now has the ability to review the decision of the former. (See *Conservatorship of Berry* (1989) 210 Cal.App.3d 706, 714-715 [explaining the relevant statutory change].) But there is no dispute that each still has equal authority to make the determination *in the first instance*.

[7] Technically, by admitting the petition the Attorney General admitted the allegation that the trial court also requires defendants to "*pay* to consult" with counsel. (Italics added.) But even if the court only requires that defendants consult with an attorney (whether free or paid), that point would not significantly alter the issues here.

Cal.App.3d 1287, 1297-1298.) Put another way, "The discretion conferred upon the court 'is a discretion, governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be.' [Citation.] That is to say, the range of judicial discretion is determined by analogy to the rules contained in the general law and in the specific body or system of law in which the discretionary authority is granted." (*County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1778.) Discretion must "be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424.)

We do not see how the described practice advances the spirit of the laws regarding arraignments and an indigent defendant's right to the prompt appointment of counsel.

We have said that: "This statutory standard [for determining indigency] is necessarily a flexible one and the question must be approached and solved realistically. *The need for representation is immediate. It arises at least as early as the first formal criminal charge, which in this case was a complaint.* Those having funds to employ private counsel generally have representation earlier than that." (*People v. Ferry* (1965) 237 Cal.App.2d 880, 886-887, italics added.) Thus, delay is to be avoided if possible. But the practice described instead *causes* delay in most if not all cases. Further, the delay caused by the practice here is not dispositive of the question to be decided by the trial court: defendant's indigency.

We agree with the Attorney General that a trial court has discretion as to how to determine whether a defendant is indigent. We have said before that "whether a defendant is eligible for services of the public defender is within the authority and discretion of the trial court. ' . . . Trial judges are in the best possible position administratively to decide the question involved, because the facts involved in each case must determine the answer.' [Citation.]" (*People v. Longwith* (1981) 125 Cal.App.3d 400, 410.) And by statute the court has the discretion to consider whether to overrule a public defender's contrary determination. (See § 27706.) The practice of repeatedly

sending defendants out to talk to an attorney and report back to the court is not dispositive of the court's determination of indigency. And if an arraignment judge is not satisfied with a given defendant's bare claim of indigency in open court (cf. *In re Smiley* (1967) 66 Cal.2d 606, 619 ["most judges will accept a defendant's assessment"]) the defendant can be asked to fill out a financial statement as provided by section 27707.

Thus, the described typical practice frustrates the policy of prompt appointment of counsel for indigent defendants and is not an efficient way to provide useful information to the court to resolve a claim of indigency; it poses a needless obstacle to overcome, and perversely increases the burden on those defendants least able to bear the brunt.

A trial court may continue an arraignment on defendant's request to *allow* (rather than to *compel*) a defendant to consider his or her options and try to find counsel; that is a common and benign arraignment practice. And the court may certainly question the information a defendant provides on the standard form (or a similar local form) or require further information not sought on the form. Further, the court may arrange to designate a county officer to make an inquiry of the defendant's financial circumstances and then make a written recommendation to the court if that option is available. (See Pen. Code, §§ 987, subd. (c), 987.81, subd. (b).)

We hold here only that to *routinely and generally as a first resort* put defendants claiming indigency to the burden of waiting to have their case resolved and requiring them to incur the time and expense of finding out the cost of hiring an attorney is not "in conformity with the spirit of the law" but instead tends "to impede or defeat the ends of substantial justice." (*Bailey v. Taaffe*, *supra*, 29 Cal. at p. 424.)

Because the practice described by the petition departs from statutory and established precedential norms, we need not address the alternative constitutional and other arguments raised in the petition. A good case for relief has been established.[8]

III

The Remedy

The procedural posture of this case is somewhat convoluted. Defendant filed a mandamus petition in the appellate division, which denied the petition by summary order, i.e., without explanation. The public defender's office then filed this original petition seeking an order compelling the appellate division to vacate its order and to enter a new order granting relief.

But because the underlying case has been resolved, we see no real purpose in ordering the appellate division to vacate its order denying relief and to enter a new order granting relief. That would be both cumbersome and unnecessary. Instead, we will issue a writ directly to the Superior Court with prospective-only effect.

Prospective-only relief has been granted in procedurally analogous cases. (See *Bracher v. Superior Court* (2012) 205 Cal.App.4th 1445, 1448, 1458-1459 [prospective writ relief to preclude court from enforcing blanket rule that all misdemeanor defendants must appear at readiness conference in person contrary to Pen. Code, § 977]; *Simmons v. Superior Court*, *supra*, 203 Cal.App.3d at p. 75 [rejecting a blanket rule that misdemeanants who promise to appear may not subsequently appear by counsel and pointing out that "our decision effectively provides a declaration of the rights under the law"].) It is also consistent with an alternative prayer in the petition, which seeks "such

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8 We need not address the Attorney General's argument that the public defender lacks standing and defendant L.Y. should be substituted in as the petitioner. Whether this is correct, it would be a pointless exercise at this point to change the caption--with no change in the substance--of this decision. (Cf. Civ. Code, § 3532 ["The law neither does nor requires idle acts"].)

other and further relief as the Court deems proper and just in this case." And shifting the focus of our writ to the Superior Court falls within our inherent power to make our order "conform to law and justice." (Code Civ. Proc., § 128, subd. (a); cf. *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1344-1345.)

DISPOSITION

Let a writ issue (1) compelling the trial court to recognize the public defender's office as counsel of record when the public defender has found a defendant to be indigent unless the court finds otherwise consistent with section 27707, and (2) prohibiting the trial court from maintaining the general practice of continuing arraignments to require defendants to contact an attorney and return to court before making an indigency finding.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P.J.

/s/
Mauro, J.